

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVE MOSHTAGH, an individual, on)
behalf of himself and others similarly situated,)
)
Plaintiffs,)
)
v.)
)
THE HOME DEPOT U.S.A., INC., a)
Delaware corporation,)
)
Defendant.)

Case No. 2:19-cv-1205

NOTICE OF REMOVAL TO FEDERAL COURT

Defendant Home Depot U.S.A., Inc. (“Home Depot”) hereby removes to this Court the state court action described below, pursuant to 28 U.S.C. §§ 1332(d)(2), 1441, 1446, and 1453. In support, Home Depot states as follows.

1. On June 28, 2019, the above-referenced action was filed and is currently pending against Home Depot in this Superior Court for the State of Washington, King County, Case No. 19-2-17245-2 SEA. Pursuant to LCR 101(b), a true and correct copy of plaintiff’s complaint is attached. Plaintiff served his complaint on Home Depot on July 2, 2019. Declaration of John S. Devlin (“Devlin Decl.”), filed concurrently, at ¶ 4, Ex. C.

2. On July 29, 2019, Home Depot filed its Answer to the Complaint. A true and correct copy of Home Depot’s Answer and all process, pleadings, and orders served upon Home Depot as part of the above action are attached to the Devlin Decl.

3. Plaintiff is a current Home Depot employee. He alleges that Home Depot

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1 violated Washington wage law by (i) failing to pay hourly and overtime wages, (ii) failing to
 2 provide statutorily required rest breaks, and (iii) making unlawful payroll deductions. Compl.
 3 ¶¶ 6.1 -9.3. Plaintiff also alleges that Home Depot violated the Consumer Protection Act
 4 (“CPA”), committing “deceptive acts or practices in trade or commerce” by failing to pay the
 5 putative class in accordance with Washington law and by its communications to the general
 6 public regarding its pay practices. *Id.* ¶¶ 4.17-4.20, 10.1-10.5.

7 4. Plaintiff seeks to bring this action on behalf of a class consisting of all persons
 8 employed by Home Depot as hourly, non-exempt employees in Washington at any point three
 9 years prior to the filing of Complaint, June 28, 2016, who (1) “had money deducted from their
 10 paychecks for The Homer Fund”; (2) “worked at least one shift...that ended after the store
 11 closed to the public”; or (3) “worked at least one shift of five hours in the district in
 12 which...Plaintiff worked.” *Id.* ¶ 5.2.¹

13 5. Timeliness. Plaintiff filed his Complaint in King County Superior Court on
 14 June 28, 2019. The Complaint was served on Home Depot on July 2, 2019. Home Depot’s
 15 Notice of Removal is therefore timely because it is being filed within 30 days of the date of
 16 service. *See* 28 U.S.C. § 1446(b).

17 6. Jurisdiction. This is a civil action over which this Court has original jurisdiction
 18 and thus may be removed pursuant to 28 U.S.C. § 1441. Under 28 U.S.C. § 1441, a defendant
 19 may remove to federal district court “any civil action brought in a State court of which the
 20 district courts of the United States have original jurisdiction[.]” Pursuant to the Class Action
 21 Fairness Act (“CAFA”), 28 U.S.C. § 1332(d)(2), federal district courts have original
 22 jurisdiction over a class action if (1) it involves 100 or more putative class members, (2) any
 23

24 ¹ Home Depot denies plaintiff’s allegations and disputes that this action is appropriate for class
 25 treatment. However, for purposes of estimating the amount in controversy, the allegations of
 26 plaintiff’s complaint are assumed to be true. *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp.
 27 2d 1199, 1205 (E.D. Cal. 2008) (“In measuring the amount in controversy, a court must assume
 that the allegations of the complaint are true and that a jury will return a verdict for the plaintiff
 on all claims made in the complaint. The ultimate inquiry is what amount is put ‘in
 controversy’ by the plaintiff’s complaint, not what a defendant will actually owe.” (citations
 omitted)).

1 class member is a citizen of state different from any defendant, and (3) the aggregated
 2 controversy exceeds \$5,000,000 (exclusive of costs and interest). *See* 28 U.S.C. § 1332(d)(2),
 3 (d)(6), and (d)(11)(B)(i). These criteria are satisfied here.

4 7. Class Size. Plaintiff seeks to bring this action on behalf of all persons employed
 5 by Home Depot as hourly, non-exempt employees in Washington at any point three years prior
 6 to the filing of Complaint, June 28, 2016, who (1) “had money deducted from their paychecks
 7 for The Homer Fund”; (2) “worked at least one shift...that ended after the store closed to the
 8 public”; or (3) “worked at least one shift of five hours in the district in which...Plaintiff
 9 worked.” Compl. ¶ 5.2. Plaintiff acknowledges that the number of class members is estimated
 10 to “exceed 1,000.” *Id.* ¶ 5.4.a. In fact, since June 28, 2016, over 12,800 hourly, non-exempt
 11 employees in Washington have had paycheck deductions for donations to The Homer Fund;
 12 over 15,000 worked a shift that ended after their store closed to the public; and over 3,000
 13 worked approximately five hours in a shift. Declaration of G. Edward Anderson (“Anderson
 14 Decl.”), filed concurrently, ¶¶ 6-8.² Thus, the putative class includes more than 100
 15 individuals.

16 8. Diversity of Citizenship. At all relevant times, there has been diversity of
 17 citizenship between the parties to the action. “[U]nder CAFA, complete diversity is not
 18 required; ‘minimal diversity’ suffices.” *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th
 19 Cir. 2007) (internal citations omitted). Minimal diversity exists if any class member is a citizen
 20 of a state different from any defendant. 28 U.S.C. § 1332(d)(2).

21 9. The putative class includes citizens of Washington, including plaintiff
 22 Moshtagh. Moshtagh maintains a Washington residential address on file with Home Depot and
 23 works at retail store in Bothell, Washington. *See* Declaration of Deanne Clawson (“Clawson
 24 Decl.”), filed concurrently, ¶ 4; Compl. ¶ 2.1 (Plaintiff resides in “Kirkland, Washington” and
 25 “worked at the Home Depot store in Bothell, Washington from approximately February 2016 to
 26

27 ² A defendant may make the requisite showing by setting forth facts in the notice of removal or
 by affidavit. *See Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015).
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the present.”). Plaintiff’s employment and residence in Washington conclusively establish Washington citizenship. *See Bey v. SolarWorld Indus. Am., Inc.*, No. 3:11-cv-1555-SI, 2012 WL 6692203, at *2 (D. Or. Dec. 26, 2012) (residential address provided by employee to employer is prima facie evidence of citizenship).

10. Further, plaintiff seeks to represent a class consisting of thousands of current and former Washington employees. Compl. ¶ 5.2. This putative class logically includes other Washington citizens as well.

11. Home Depot is not a citizen of Washington. “[A] corporation shall be deemed to be a citizen of every State ... by which it has been incorporated and of the State ... where it has its principal place of business....” 28 U.S.C. § 1332(c)(1). Home Depot is not incorporated in Washington. As plaintiff concedes, Home Depot is organized and incorporated under the laws of Delaware. *See Ottaviano v. Home Depot, Inc. U.S.A.*, 701 F. Supp. 2d 1005, 1007 (N.D. Ill. 2010) (Home Depot “is a Delaware corporation with its principal executive offices located in Atlanta, Georgia”); *Novak v. Home Depot U.S.A., Inc.*, 259 F.R.D. 106, 108 (D.N.J. 2009) (Home Depot “is a Delaware corporation with its principal offices located in Georgia”); Compl. ¶ 2.2; Clawson Decl. ¶ 2. Nor is Washington the state in which Home Depot has its principal place of business, which is “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities.” *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010). Rather, Home Depot’s principal place of business is Atlanta, Georgia. *Ottaviano*, 701 F. Supp. 2d at 1007; *Novak*, 259 F.R.D. at 108; Clawson Decl. ¶ 2.

12. Accordingly, this action involves citizens of different states: Plaintiff is a citizen of Washington (and seeks to represent other Washington citizens) and Home Depot is a citizen of Delaware and Georgia. Thus, the CAFA minimal diversity requirement is satisfied. *See* 28 U.S.C. § 1332(d)(2).

13. Amount in Controversy. Home Depot avers, for purposes of this Notice only and without conceding liability for the claims alleged by plaintiff, or that plaintiff can properly represent the putative class, that plaintiffs’ claims place more than \$5 million in controversy.

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1 “The amount in controversy is simply an estimate of the total amount in dispute, not a
 2 prospective assessment of [the] defendant’s liability.” *Lewis v. Verizon Commc’ns, Inc.*, 627
 3 F.3d 395, 400 (9th Cir. 2010) (on removal, defendant does not “concede liability for the entire
 4 amount” alleged in complaint); *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1198 n.1 (9th
 5 Cir. 2015) (“Even when defendants have persuaded a court upon a CAFA removal that the
 6 amount in controversy exceeds \$5 million, they are still free to challenge the actual amount of
 7 damages in subsequent proceedings and at trial ... because they are not stipulating to damages
 8 suffered”). As the United States Supreme Court has held, a defendant’s notice of removal need
 9 only include a plausible allegation that the amount in controversy exceeds the jurisdictional
 10 threshold. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 549, 554
 11 (2014). Moreover, the Ninth Circuit has instructed that removal is proper if, based on the
 12 allegations of the complaint and the Notice of Removal, it is more likely than not that the
 13 amount in controversy exceeds \$5 million. *Rodriguez v. AT&T Mobility Servs., Inc.*, 728 F.3d
 14 975, 981 (9th Cir. 2013) (overturning Ninth Circuit precedent requiring proof of amount in
 15 controversy to a “legal certainty” in some circumstances). The action belongs in federal court
 16 once the proponent of federal jurisdiction has put forth damages estimates that “explain[]
 17 plausibly how the stakes exceed \$5 million” unless plaintiff can show “it is *legally impossible*
 18 for the plaintiff to recover that much.” *Rhoades v. Progressive Cas. Ins. Co., Inc.*, 410 F.
 19 App’x 10, at *1 (9th Cir. 2010) (citations omitted)(emphasis added). In determining whether
 20 the amount in controversy is met, the Court considers all requested relief, “including ...
 21 punitive damages, statutory penalties, and attorney’s fees.” *Lake v. Delta Air Lines, Inc.*, No.
 22 SACV 10-1775 DOC(Ex), 2011 WL 3102486, at *4 (C.D. Cal. July 22, 2011); *Korn*, 536 F.
 23 Supp. at 1205 (courts may consider the maximum statutory penalty allowed). Under this
 24 standard, the amount in controversy is easily met.

25 14. In the First Cause of Action, plaintiff alleges that workers are deprived of
 26 regular and overtime wages due to Home Depot’s “policy and practice of deducting money
 27 from the paychecks” of hourly workers for The Homer Fund. Compl. ¶ 6.2. Plaintiff alleges

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1 all of these deductions were unlawful and that Home Depot's practice of making such unlawful
 2 deductions was willful. *Id.* ¶¶ 6.2, 9.2. As a result, plaintiff seeks double the regular and
 3 overtime wages allegedly deprived. *Id.* ¶¶ 6.2, 9.2-9.3. Plaintiff files this claim on behalf of
 4 "all" hourly associates who have had any money deducted from their paychecks "at any time"
 5 within the three years prior to the filing of the complaint. *Id.* ¶ 5.2(a).

6 15. Since June 28, 2016, over 12,800 hourly employees in Washington have had
 7 money deducted from their paychecks for donations to The Homer Fund. Anderson Decl. ¶ 6.
 8 The deductions total approximately \$1,076,402. *Id.* Doubling this amount as alleged in the
 9 complaint yields a damages estimate for this claim of **\$2,152,804**, excluding interest.

10 16. In the Second Cause of Action, plaintiff alleges that Home Depot had a "policy
 11 and practice" of denying 10-minute rest breaks to employees who worked in the plaintiff's
 12 district "when they were scheduled to work five hours per shift." Compl. ¶¶ 4.8, 7.3. Plaintiff
 13 alleges this practice of denying rest breaks was willful. *Id.* ¶¶ 9.1-9.2. As a result, plaintiff
 14 seeks double the regular wages owed for missed rest breaks. *Id.* ¶¶ 7.5, 9.1-9.3. Plaintiff
 15 brings this claim on behalf of all hourly associates who worked at least one shift of five hours
 16 in a Home Depot store in plaintiff's district. *Id.* ¶ 5.2(c).

17 17. During the period June 28, 2016 through August 1, 2019, hourly, non-exempt
 18 employees worked 39,367 shifts of approximately five hours. Anderson Decl. ¶ 7. Using the
 19 average wage rate of these associates of \$13.50 per hour, and estimating one missed 10-minute
 20 rest break in only 50 percent of shifts, the amount placed in controversy by plaintiff's rest break
 21 claim is approximately **\$88,573.50**, excluding interest ((19,683 shifts x \$2.25 (unpaid 10
 22 minute break)) x 2). *See id.*

23 18. In the Third Cause of Action, plaintiff alleges that Home Depot has a "policy
 24 and practice" of requiring employees who work shifts that end after the store closes to the
 25 public to wait for a manager to unlock the store doors after clocking out. Compl. ¶¶ 4.3-4.6,
 26 8.2. Plaintiff alleges that as a result of these "uniform policies and practices," employees
 27 whose shifts are scheduled to end after store closing spend "*substantial time each shift*" waiting

1 to leave the store after clocking out. *Id.* ¶ 4.4 (emphasis added). Plaintiff alleges that the
 2 putative class was denied regular and overtime wages as a result of this practice. *Id.* ¶ 8.2.
 3 Plaintiff alleges this violation was willful, and seeks double the amount of unpaid regular and
 4 overtime wages. *Id.* ¶¶ 9.1-9.3. Plaintiff brings this claim on behalf of all hourly associates
 5 who worked at least one shift that ended after the store closed to the public. *Id.* ¶ 5.2(b).

6 19. Since June 28, 2016, over 15,000 associates have worked 1,196,880 shifts that
 7 ended after a store closes. Anderson Decl. ¶ 8. Using the average wage rate for these
 8 associates of \$14.21 per hour and estimating six minutes of wait time each shift, the amount
 9 placed in controversy by plaintiff's Third Cause of Action is **\$3,399,139**, excluding interest
 10 $((1,196,880 \text{ shifts} \times \$1.42) \times 2)$.³ *See id.*

11 20. In the Fifth Cause of Action, plaintiff alleges that Home Depot engaged in
 12 "deceptive acts and practices in commerce" in violation of the CPA by failing to pay putative
 13 class members in accordance with Washington law and through its communications to the
 14 general public regarding its pay practices and The Homer Fund. Compl. ¶¶ 10.1-10.5. Plaintiff
 15 seeks damages under RCW 19.86.090, which provides for actual and treble damages up to
 16 \$25,000 per class member. *Id.* ¶ 10.5, RCW 19.86.090; *Korn*, 536 F. Supp. at 1205 (courts
 17 may consider the maximum statutory penalty allowed); *see also Smith v. Behr Process Corp.*,
 18 113 Wn. App. 306, 345-46, 54 P.3d 665 (2002).

19 21. Considering only the damages for alleged unlawful deductions for the Homer
 20 Fund, the amount placed in controversy by plaintiff's Fifth Cause of Action is a minimum of
 21 **\$3,288,964.98** (12,847 employees x \$83.78 avg. deduction x 3). *See* Anderson Decl. ¶ 6. This
 22 amount does not take into account damages the putative class is seeking under the CPA for
 23 alleged rest period violation or off-the-clock time waiting for a manager to unlock the doors
 24 after store closing.

25 ³ Plaintiff's complaint supports the use of a 100% violation rate since he alleges that class
 26 members spent substantial time waiting "*each shift*" after clocking out. Compl. ¶ 4.4
 27 (emphasis added). However, even if defendant assumed only a 50% violation rate, the amount
 put in controversy by plaintiff's Third Cause of Action would be \$1,699,569.60 $((598,440$
 $\text{shifts} \times \$1.42) \times 2)$, which is more than sufficient to satisfy the threshold under CAFA.

22. In connection with each cause of action, plaintiff also seeks attorney's fees, which are included in the amount in controversy. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998); *Fritsch v. Swift Transportation Co. of Arizona, LLC*, 899 F.3d 785, 793-94 (9th Cir. 2018) (the amount in controversy includes "attorneys' fees awarded under fee-shifting statutes or contract", including future attorneys' fees). The Ninth Circuit has established 25 percent of total potential damages as a benchmark for attorneys' fees. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Deaver v. BBVA Compass Consulting & Benefits, Inc.*, No. 13-cv-00222-JSC, 2014 WL 2199645, at *6 (N.D. Cal. May 27, 2014) (accounting for attorneys' fees by adding 25 percent of potential damages and penalties to amount in controversy). Assuming attorney's fees of 25 percent on only plaintiff's actual amount in controversy (rather than double for his wage claims, as would be permitted) for only his First, Second, and Third Causes of Action described above places an additional **\$705,000** in controversy. *See Johnson v. Tractor Supply Co.*, No. 19-cv-0270, 2019 WL 2004436, at *3-4 (W.D. Wash. May 7, 2019) (appropriate to include attorney's fees at rate of 25% "of the amount sought by Plaintiff.").

23. In short, even by conservative estimates, the total monetary relief placed in controversy by the complaint is well over **\$9 million**. Therefore, the amount in controversy requirement is satisfied. *See Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700-01 (9th Cir. 2007) (remand denied under preponderance of evidence standard where defendant's conservative estimates exceeded the requisite amount).

24. Venue. The United States District Court for the Western District of Washington is the judicial district "embracing the place" where this action was filed by plaintiff and is the appropriate court for removal pursuant to 28 U.S.C. § 1441(a).

25. There are no grounds that would justify this Court in decline to exercise jurisdiction pursuant to 28 U.S.C. § 1332(d)(3) or requiring it to decline to exercise jurisdiction pursuant to 28 U.S.C. § 1332(d)(4).

1 WHEREFORE, Home Depot requests that the above action now pending in the
2 Superior Court of Washington for King County be removed to this Court. In the event the
3 Court has any reason to question whether removal is proper, Home Depot requests the
4 opportunity to provide briefing on this issue.

5 DATED: August 1, 2019

6 LANE POWELL PC

7
8 By s/ John S. Devlin

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice. I hereby certify that the following document was sent to the following CM/ECF participant:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None.

Executed on the 1st day of August, 2019, at Seattle, Washington.

s/Maria G. Raines

Maria G. Raines, Legal Assistant